84-588

Office-Supreme Court, U.S.
FILED
OCT 9 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INSURANCE FINANCIAL SERVICES INC.,

Petitioner,

versus

SOUTH CAROLINA INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

DAVID M. RATCHFORD
1531 Laurel Street
Columbia, South Carolina 29201
(803) 779-0700

Attorney for Petitioner

67pp

QUESTIONS PRESENTED

Did the South Carolina Supreme Court violate the petitioner's right to due process in overruling its prior holding in the same case that the application of South Carolina Code §38-37-940(2) to a contract entered into prior to the effective date of the statute did not violate the contract clause of the United States Constitution?

Did the South Carolina Supreme Court violate the petitioner's right to equal protection in overruling its prior holding in the same case that the application of South Carolina Code §38-37-940(2) to a contract entered into prior to the effective date of the statute did not violate the contract clause of the United States Constitution?

Did the South Carolina Supreme Court violate the petitioner's right to due process in reversing the jury verdict in favor of the petitioner based upon its construction of the contract clause of the United States Constitution when that issue was not raised in the lower court nor preserved for appeal?

Did the South Carolina Supreme Court violate the petitioner's right to equal protection in reversing the jury verdict in favor of the petitioner based upon its construction of the contract clause of the United States Constitution when that issue was not raised in the lower court nor preserved for appeal?

Did the South Carolina Supreme Court err in holding that the application of

South Carolina Code §38-37-940(2) to a contract entered into prior to the effective date of the statute violated the contract cause of the United States Constitution?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iv
Table of Authorities	vi
Designation of Corporate Relationships	viii
Opinion Below	1
Jurisdictional Statement	1
Constitutional Provisions and Statutes	2
Statement	3
Argument	8
Conclusion	17
Appendices	
Appendix A. Insurance Financial Services, Inc. v. The South Carolina Insurance Company.	A-1
Appendix B. Consent Order of 12/6/78	B-1
Appendix C. Order Denying Rehearing	C-1
Appendix D. Petition for Rehearing	D-1

Page

Appendix E. Article I, Section 10, of the United States Constitution E-1

Appendix F. Fourteenth Amendment to the United States Constitution F-1

Appendix G. §38-5-70. Payment of taxes and performance of duties as condition precedent to doing business G-1

Appendix H. §38-5-500. Expiration date of licenses H-1

Appendix I. §38-37-310. Insurance required to insure; exceptions. I-1

Appendix J. §38-37-920. Insurers and agents shall not refuse acceptance of insurance; property rights of certain agents; restriction of mailings to certain areas. J-1

Appendix K. §38-37-940(2). Avoiding certain classes or types of risk; exceptions; canceling agent's representation K-1

TABLE OF AUTHORITIES

Page

Cases

Allied Structural Steel Company v. Spannaus, et al., 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed. 2d 727 (1978) 15

Bobo Brothers, Inc. v. South Carolina Tax Commission, 272 S.C. 18, 244 S.E.2d 519 (1978). 13

G-H Insurance Agency, Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336 (1982). 6

Huggins v. Winn Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969). 11

Rowell Insurance Company v. Harleysville Mutual Insurance Company, 272 S.C. 108, 250 S.E.2d 111 (1978) 4,6

United States Trust Company v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1978). 15

Constitution and Statutes

Article I, Section 10 of the United States Constitution . . .14,15

Page

Fourteenth Amendment to the
United States Constitution 10,13

South Carolina Code Section
38-5-70 15

South Carolina Code Section
38-5-500 16

South Carolina Code Section
38-37-310 3

South Carolina Code Section
38-37-920 3

South Carolina Code Section
38-37-940(2) 1,3,4,
9,14,17

DESIGNATION OF CORPORATE RELATIONSHIPS

Insurance Financial Services, Inc., filing this Petition for Writ of Certiorari as petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Insurance Financial Services, Inc. is not owned by any parent corporation.

Insurance Financial Services, Inc. does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries).

Insurance Financial Services, Inc. does not have any affiliates.

October 9, 1984.

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported at _____S.C.____, 318 S.E.2d 10 (1984).

JURISDICTIONAL STATEMENT

The judgment of the South Carolina Supreme Court was filed on June 8, 1984. A petition for rehearing was timely filed on June 18, 1984. The order denying the petition for rehearing was made and entered on July 11, 1984. Copies thereof are appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

This proceeding involves the question of the constitutionality of South Carolina Code §38-37-940(2) and, therefore, 28 U.S.C. 2403(b) may be applicable.

CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent provisions of the United States Constitution and the statutes involved are set forth in the Appendices attached hereto.

STATEMENT

In 1974, Act 1177, now codified as South Carolina Code §38-37-10 et seq., was enacted by the South Carolina General Assembly as a comprehensive reform of the system of the sale of automobile insurance. Basically, this Act attempted to make automobile insurance available to all qualified applicants without discrimination in rates, coverage, or service. To accomplish this, the law prohibited insurance companies and agents from refusing to sell insurance to qualified customers. South Carolina Code §§38-37-310 and 38-37-940. In order to prevent insurance companies from avoiding this mandate of coverage, South Carolina Code §38-37-940(2) was included making it illegal for a company to cancel its representation by an agent for the purpose of avoiding automobile insurance. This statute became effective on July 9, 1974.

At that time, the petitioner was an independent insurance agency selling automobile insurance for South Carolina Insurance Company pursuant to a contract entered into on February 14, 1972. In July, 1975, the company notified the petitioner that it was terminating the contract in thirty days. The petitioner brought suit in state court against the company alleging that the contract had been terminated in violation of South Carolina Code §38-37-940(2). In 1978, the lower court granted the company's motion for summary judgment on the grounds that the statute could not be applied to a contract entered into prior to the effective date of the statute without unconstitutionally impairing contract rights. The petitioner appealed this decision to the South Carolina Supreme Court. While that appeal was pending, the South Carolina Supreme Court issued its opinion in David E. Rowell, d/b/a Rowell

Insurance Agency v. Harleysville Mutual Insurance Company, 272 S.C. 108, 250 S.E.2d 111 (1978), which held that the application of this statute to contracts entered into prior to its effective date did not unconstitutionally impair contract rights. Based upon this ruling, the trial court's award of summary judgment was summarily reversed and the case was remanded for trial by order of the South Carolina Supreme Court dated December 6, 1978.

In March, 1981, the case was tried before a jury, and the petitioner was awarded judgment in the amount of One Hundred Thousand and No/100 Dollars ($100,000.00) actual damages and Five Hundred Fifty Thousand and No/100 Dollars ($550,000.00) punitive damages. This verdict was appealed by the company to the South Carolina Supreme Court. While this appeal was pending, the South Carolina Supreme Court reversed its earlier holding

in Rowell v. Harleysville, supra, and decided that this statute could not be applied to contracts entered into prior to the effective date of the Act in G-H Insurance Agency, Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336 (1982).

On June 8, 1984, the South Carolina Supreme Court reversed the jury verdict in this case on the grounds that the statute could not be applied to the contract sued upon without unconstitutionally violating contract rights, basing its ruling upon the decision in G-H v. Continental, supra. The court stated that no purpose would be served by granting a new trial and remanded the case for the entry of a judgment in favor of the company.

The petitioner timely filed a petition for rehearing which is set forth in Appendix D. Therein, the petitioner raised the federal questions for which review is now

sought. Since these questions were addressed to the propriety of the decision which the petitioner asked to have reheard, this was the petitioner's first opportunity to raise these issues. On July 11, 1984, the South Carolina Supreme Court in a three to two decision denied the petitioner's request for a rehearing.

ARGUMENT

With the passage of Act 1177 of 1974, the South Carolina General Assembly sought to eliminate many abuses and injustices by providing for the full availability of automobile insurance on a non-discriminatory basis. Prior to this time, there were no restrictions on the manner in which insurance companies and agents selected their customers, and many of the factors relied upon were subjective and discriminatory. As a result, many citizens were forced to pay substantially higher premiums for subjective reasons or were totally unable to obtain automobile insurance. With the passage of Act 1177, insurance companies and agents both were required to accept all qualified applicants on a non-discriminatory basis.

Since a company could no longer accept or reject customers on an individual basis,

the Legislature foresaw that companies might attempt to avoid their share of the sub-standard business by firing agents writing a large volume of the type of business they did not wish to accept. Such a result would be unfair to the agent since he had no control over the selection of the customer under the terms of the new law. Therefore, the Legislature included South Carolina Code §38-37-940(2) to protect insurance agents and to encourage them to abide by the law by prohibiting insurance companies from firing agents because of the amount of business they wrote which the companies did not want to accept. In this case, the jury found that the company cancelled its contract with the petitioner for the purpose of avoiding automobile insurance in violation of that statute.

Traditionally, contracts between insurance companies and agents provide that

they may be cancelled at any time by either party upon a short written notice, and the contract entered into by the parties herein in 1972 so provided. In 1978, the South Carolina Supreme Court issued its order in this case holding that the application of the statute to this particular contract did not unconstitutionally impair vested contractual rights and remanded the case for trial. This issue was not raised again by the company in the lower court through the pleadings, a motion for directed verdict, or a motion for a new trial. This defense was first reasserted by way of the exceptions presented by the company in its appeal of the jury verdict.

I. The Refusal of the South Carolina Supreme Court to Adhere to the Doctrine of the Law of the Case Violates the Petitioner's Rights to Due Process

and Equal Protection.

There are numerous cases in which the South Carolina Supreme Court has stated that its decision in a former appeal becomes the law of the case, and that questions decided therein are res judicata and not subject to review upon subsequent appeal in the same action. Huggins v. Winn Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969). There is not a single case in South Carolina in which the South Carolina Supreme Court has deviated from this rule. As recognized by the South Carolina court, this doctrine has the salutary effect of providing for a final determination as to issues or causes and of discouraging the prolongation of litigation for the sole purpose of seeking a different result on an issue that has already been decided.

While it may be argued that this doctrine is procedural in nature, it has been so strictly adhered to and firmly imbedded in South Carolina law that it has become a rule of substance. The parties should not be forced to continue with years of litigation based upon a ruling, in this case three years, only to have the court change its mind.

Perhaps more important, the South Carolina court has applied a different rule in this instance than it has in every other instance. Because the petitioner has been singled out and denied the benefit of the doctrine of the law of the case extended to every other litigant, the petitioner has been denied its right to equal protection.

II. The Consideration of the Constitutional Issue Not Raised in the Lower Court and Preserved for Appeal Violates the

Petitioner's Rights to Due Process and Equal Protection.

In cases too numerous to cite, the South Carolina Supreme Court has repeatedly stated that it will not consider a question not raised or passed upon at all in the lower court and raised for the first time on appeal. Bobo Brothers, Inc. v. South Carolina Tax Commission, 272 S.C. 18, 244 S.E.2d 519 (1978). In this instance, the company did not raise the issue of constitutionality by way of its pleadings, motion for directed verdict or motion for judgment notwithstanding the verdict. Accordingly, the company waived this issue and it should not have been considered on appeal.

The failure of the company to raise this issue in the lower court denied the petitioner any opportunity to respond to it and present any arguments or evidence in

favor of the constitutionality of the statute. This failure is even more important since the South Carolina Supreme Court reversed the jury verdict but did not remand the case for a new trial.

In this instance, the company had every opportunity to raise this issue in the lower court and preserve it for consideration on appeal. Since the company chose not to do so, the consideration of this issue raised for the first time on appeal violates the petitioner's right to due process and equal protection.

III. The Application of South Carolina Code §38-37-940(2) to Contracts Entered Into Prior to the Effective Date of the Statute Does Not Unconstitutionally Impair Contractual Rights.

In this instance, the South Carolina

Supreme Court held that the application of this particular statute to the contract between the parties would unconstitutionally impair the company's vested contractual rights. This ruling was based upon the decisions in United States Trust Company v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1978) and Allied Structural Steel Company v. Spannaus. et al. v. Spannaus, et al., 438 U.S. 234, 98 S.Ct. 2716, 57 L. Ed.2d 727 (1978).

In examining these two cases and the statutes and the contracts involved herein, the South Carolina court incorrectly concluded that this action involved an unconstitutional retroactive impairment of vested contractual rights. Most significantly, the company in this instance does not have any vested rights under its contract with the agent. South Carolina Code §38-5-70 clearly provides that the company, as a condition

for the privilege of doing business in the state, agrees to perform all duties now or hereafter prescribed by law. Accordingly, when the company entered into its contract with the petitioner, it knew that its contractual relationship was subject to legislative change when necessary to serve the public interest.

In addition, the South Carolina court incorrectly concluded that this action involved the retroactive application of the statute. In particular, the court argued that the impact of the law upon existing contracts was immediate and unavoidable. However, South Carolina Code §38-5-500 provides that an insurance company's license to do business in South Carolina expires on the 31st of March of each year. Therefore, when the company renewed its license to do business in South Carolina on April 1, 1975, it had knowledge that South

Carolina Code §38-37-940(2) had become effective on July 9, 1974. If the company had felt that the provisions of South Carolina Code §38-37-940(2) were too unfavorable, then it could have chosen not to renew its license to do business in South Carolina. However, having accepted that license, it should not have been allowed to avoid the provisions of the statute in existence at that time.

CONCLUSION

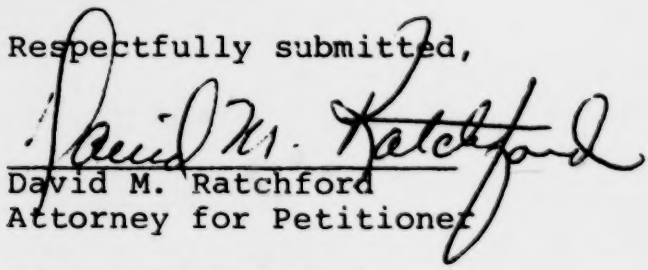
Three years after this action was commenced, the South Carolina Supreme Court ruled in this case that there was no unconstitutional impairment of contractual rights. Approximately three years thereafter, a jury found that the company had violated the law when it terminated the petitioner's contract. After three more years, the South Carolina Supreme Court reversed its earlier ruling

and the jury verdict. The refusal of the South Carolina Court to respect the doctrine of the law of the case, despite having done so in every other instance, violates the petitioner's rights to due process and equal protection. Even if the court had not been bound by its earlier ruling in the same case, the failure of the company to preserve this issue for appeal should have precluded the court from considering it. Because the court has always refused to review issues not properly preserved for appeal, its decision in this case violates the petitioner's rights to due process and equal protection.

Finally, this case raises an extremely important question with regard to the extent of a state's police power to enact legislation in the public interest. Since this case involves a heavily regulated industry, the ability of legislative bodies to enact

police power legislation is of particular importance. If the ruling in this case is allowed to stand, then regulated companies will be free to effectively prevent modification of the terms of that regulation by asserting a violation of contract rights. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



David M. Ratchford
Attorney for Petitioner

1531 Laurel Street
Columbia, South Carolina 29201
(803) 779-0700

APPENDIX A

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Insurance Financial Services, Inc.,. . . .

Respondent,

v.

The South Carolina Insurance

Company . . . . . .Appellant.

Appeal From Richland County

Walter T. Cox, III, Judge

OPINION NO. 22129

Heard January 24, 1984 - Filed June 8, 1984

REVERSED

Charles H. Gibbs and John P. Linton, of Charleston, and David W. Robinson, II, Lanville H. Mengedoht and Bernard Manning, of Columbia, for Appellant.

David M. Ratchford and Charles F. Cooper, II, of Columbia, for Respondent.

LITTLEJOHN, A.J.: Plaintiff-Respondent, Insurance Financial Services, Inc., a local real estate agency, brings this action against the Defendant-Appellant, South Carolina Insurance Company, alleging the wrongful cancellation of an agency contract in violation of the South Carolina Code. The issues were tried by a jury resulting in a verdict of $100,000 actual damages plus $550,000 punitive damages. The Insurance Company has appealed, alleging several ground entitling it to either judgment notwithstanding the verdict or a new trial. We reverse.

The Agency, which sells automobile liability insurance, and the Insurance Company entered into a contract on February 14, 1972. This contract authorized the Agency to sell policies of insurance on behalf of the Insurance Company. The contract provided that the agreement ". . .

may be terminated by either party at any time upon written notice to the other."

In 1974, the General Assembly of South Carolina enacted Act 1177, now codified as Section 38-37-10 et seq. of the South Carolina Code. It eliminated the distinction between insureds and made it illegal to discriminate in rates, except as provided by the Insurance Commissioner, thus requiring automobile insurers, including the Insurance Company, to establish a uniform rate structure. In an effort to prevent insurers from canceling contracts with local agents, the General Assembly included Section 38-37-940(2) which states:

> No insurer of automobile insurance shall cancel its representation by an agent primarily because of the volume of automobile insurance placed with it by the

agent on account of the statutory mandate of coverage nor because of the amount of the agent's automobile insurance business which the insurer has deemed it necessary to reinsure in the Facility.

In G-H Insurance Agency, Inc. v. The Travelers Insurance Company, 270 S.C. 147, 241 S.E.2d 534 (1978), this Court held, in a three to two decision, that the statute created a cause of action in favor of a local agent against an insurance company which cancelled a contract contrary to the provision quoted above.

Thereafter, this Court held, by another three to two decision, in Rowell v. Harleyville Mutual Insurance Company, 272 S.C. 108, 250 S.E.2d 111 (1978), that the statute applied to contracts entered

into before the effective date of the act, which was July 9, 1974.

Both Rowell and the case now before us involved contracts with cancellation privileges reserved; both contracts were entered into before the statute was enacted. Here, the Insurance Company notified the Agency of termination on July 18, 1975, effective August 18, 1975.

In Garris v. Hanover, 630 F.2d 1001 (1980), the Fourth United States Circuit Court of Appeals held the statute violative of the contract clause of the federal constitution. See also United States Trust Company v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1978), and Allied Structural Steel Company v. Spannaus. et al. v. Spannaus, et al., 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed2d 727 (1978). The Fourth Circuit refused to apply the statute to a contract entered into before July 9,

1974. Although this Court is not bound by the rulings of the Circuit Court of Appeals, we agreed with its ruling in Garris and adopted its reasoning in G-H Insurance Agency, Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336 (1983). Therein, we overruled Rowell stating:

> . . .that no cause of action involving a contract entered into before the effective date of the Act [July 9, 1974] may be predicated upon the holding of this court in the case of G-H Insurance Agency, Inc. v. Travelers Insurance Company. . .

We hold that the contract sued on in this action was protected by article I, section 5 of the Constitution of South Carolina and article I, section 10 of the

Constitution of the United States. These two sections read in part as follows:

> South Carolina Constitution, Article I:
>
> §4. No . . . law impairing the obligation of contracts, . . .shall be passed, . . .
>
> United States Constitution, Article I:
>
> §10. No state shall . . . pass any . . . law impairing the obligation of contracts, . . .

The Insurance Company has filed several exceptions. We need discuss but one. We agree with its contention that the whole verdict is a result of passion, prejudice and caprice. Punitive damages are permitted to punish one for wickedness, malice, recklessness or intentional wrongdoing. It is evident, to the exclusion of all other

reasonable inferences, that the Insurance Company when it terminated the contract in July, 1975, was merely exercising a constitutionally protected right which it had reserved to itself in the contract which was agreed to by the Agency. The Company had every reason to believe that contracts entered into before July 9, 1974, could not be altered by statutory law. Both the federal court in Garris and this Court in G-H Insurance Agency, Inc. v. Continental have so held.

The verdict of the jury is accordingly vacated. It would serve no purpose to remand, to allow amended pleadings and for a new trial. The Insurance Company is entitled to prevail as a matter of law and should not be further burdened with this litigation.

The appeal is dismissed and the appeal is remanded for the purpose of

entering judgment in favor of South Carolina Insurance Company.

REVERSED.

NESS AND HARWELL, JJ., concur.

LEWIS, C.J.: (Dissenting) Since, in my opinion, the judgment should be affirmed, I dissent.

In a prior appeal in this case, this Court held that a cause of action existed for violation of Section 38-37-940, South Carolina Code of Laws, 1976. This holding is the law of the case and appellant is, under settled law, foreclosed from re-arguing an issue previously decided.

I find no trial errors and agree with the trial judge that the record amply sustains the award of both actual and punitive damages.

I would affirm the judgment and, therefore, dissent.

GREGORY, A.J.: (Dissenting and Concurring) I agree with Chief Justice Lewis that this Court held in a prior appeal in this case a cause of action exists for violation of S. C. Code Ann. §38-37-940 (1976). Thus, appellant is foreclosed from rearguing that issue.

I would affirm the award of actual damages; however, I find the award of punitive damages in the amount of $550,000.00 in the instant case so excessive as to be the result of passion, prejudice, and caprice. I would therefore reverse the award of punitive damages and remand for a new trial on this issue only.

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

APPENDIX B

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Insurance Financial Services, Inc., Appellant,	)	
vs.	)	CONSENT ORDER
South Carolina Insurance Company, Respondent.	)	

Based upon the Affidavit of Counsel, and with the consent of the attorney for the Respondent, and it appearing that the present matter involves an identical issue recently decided by the Supreme Court of South Carolina in the matter of David E. Rowell, d/b/a Rowell Insurance Agency, vs. Harleysville Mutual Insurance Company, Opinion No. 20814, filed November 21, 1978, and that summary disposition of this matter in accord with the outcome of

that case would be proper.

IT IS ORDERED that this case be summarily disposed of, in the manner appropriate consistent with the outcome of David E. Rowell, d/b/a Rowell Insurance Agency, vs. Harleysville Mutual Insurance Company, Opinion No. 20814, filed November 21, 1978, upon the filing of the remittitur in that matter and accordingly that no further Appellant preparation be conducted in the present case.

FOR THE COURT:

J. WOODROW LEWIS, CHIEF JUSTICE

s/By: Frances H. Smith

This 6th day of December, 1978

WE SO MOVE:	WE CONSENT:
RATCHFORD, COOPER, AND JONAS	ROBINSON, McFADDEN, MOORE AND POPE
s/	s/
DONALD E. JONAS	DAVID W. ROBINSON, II
Attorneys for Appellant	Attorneys for Respondent

cc: Donald E. Jonas, Esquire

David W. Robinson, II, Esquire

Lanville Mengedoht, Esquire

The Honorable John R. T. Major

APPENDIX C

THE SUPREME COURT OF SOUTH CAROLINA

Clyde N. Davis, Jr. P.O. Box 11330

Clerk Columbia, S.C. 29211

July 11, 1984

David M. Ratchford, Esquire

Messrs. Ratchford & Cooper

1531 Laurel Street

Columbia, South Carolina 29201

Re: Insurance Financial Services, Inc. v. The S. C. Insurance Company

Dear Mr. Ratchford:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition Denied.

s/ Bruce Littlejohn C.J.

s/ J. B. Ness A.J.

s/ David W. Harwell A.J.

I would grant the petition for a re-hearing.

s/ J. Woodrow Lewis A.A.J.

s/ George T. Gregory, Jr. A.J.

July 11, 1984."

The remittitur in this case is being sent down today.

Sincerely yours,

CLERK

CND,Jr./drj

cc: Charles H. Gibbs, Esquire

David W. Robinson, II, Esquire

APPENDIX D

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Insurance Financial Services, Inc.

Respondent.

vs.

The South Carolina Insurance Company,

Appellant.

OPINION NO. 22129

Heard January 24, 1984 - Filed June 8, 1984

PETITION FOR REHEARING

The Respondent Insurance Financial Services, Inc., by and through its undersigned attorneys, hereby petitions the Court for an order granting rehearing of the above-captioned appeal on the grounds that the majority of the Court misapprehended or overlooked the following points:

1. By Order dated December 6, 1978, the Court specifically ruled that the contract sued on in this action was not protected by Article I, Section 5 of the Constitution of the United States of America, and that decision in a former appeal became the law of this case, and the questions decided therein are res judicata and not subject to review on subsequent appeal.

2. The failure of the Court to refuse to review its earlier ruling in this case upholding the constitutionality of the application to this contract of §38-37-940(2), South Carolina Code of Laws (1976) because of the doctrine of "law of the case" violates the Respondent's right to due process of law afforded by Article I, Section 3 of the Constitution of South Carolina and by the Fourteenth Amendment of the Constitution of the United States of America.

3. The holding of this court that the

contract sued on was protected by the South Carolina Constitution and the United States Constitution, despite its prior ruling that this very contract was not so protected, and the failure to apply the doctrine of the law of the case and the principals of res judicata violates Respondent's right to equal protection guaranteed by Article I, Section 3 of the Constitution of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America.

4. Regardless of later decisions involving other litigants and other contracts, because of this court's specific ruling in its Order dated December 6, 1978, wherein it was held that the application of Section 38-37-940(2) to the contract sued upon did not violate constitutional prohibitions against the impairment of contract rights, the court misapprehended that the Appellant was exercising a constitutionally protected

right when it terminated the Respondent's contract in violation of the law.

5. Any defense based upon a claim of an unconstitutional impairment of contract was abandoned by the Appellant by its failure to petition for a rehearing of this Court's decision upholding the constitutionality of the application of Section 38-37-940(2) to this contract as contained in this Court's Order dated December 6, 1978.

6. Any defense based upon a claim of an unconstitutional impairment of contract was abandoned by the Appellant and not properly before the Court as a result of the failure of the Appellant to include this defense in its Amended Answer dated February 9, 1981 upon which this case went to trial.

7. Any defense based upon a claim of an unconstitutional impairment of contract was abandoned by the Appellant and not properly before the court as a result of the Appellant's failure to raise this issue

by a motion for a directed verdict.

8. Any defense based upon a claim of an unconstitutional impairment of contract was abandoned by the Appellant and not properly before the Court as a result of the Appellant's failure to raise this issue by a motion for judgment notwithstanding the verdict or by motion for a new trial.

9. The consideration by this Court of the issue of a claim of unconstitutional impairment of contract where that issue was not raised or considered by the lower court and was not properly preserved for appeal violates Article IV, Section 5 of the Constitution of South Carolina.

10. The consideration by this court of a claim of unconstitutional impairment of contract where that issue was not raised or considered by the lower court and was not preserved for appeal violates the Respondent's right to due process of law as

guaranteed by Article I, Section 3 of the Constitution of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

11. The consideration by this court of a claim of unconstitutional impairment of contract where that issue was not raised or considered by the lower court and was not preserved for appeal violated the Respondent's right to equal protection as guaranteed by Article I, Section 3 of the Constitution of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

12. The failure of the court to remand this case for a new trial deprives the Respondent of any opportunity to present any evidence concerning any modifications or novations of the contract which would preclude a finding that the application of §38-37-940(2) was retroactive. Since the Court had already

ruled in its Order dated December 6, 1978 that retroactivity was not an issue in this case, the Respondent had no notice and no reason to believe that it should present evidence on this issue. The failure of the Court to remand this case for a new trial violates the Respondent's right to due process of law guaranteed by Article I, Section 3 of the Constitution of South Carolina and by the Fourteenth Amendment of the Constitution of the United States of America.

13. The application of §38-37-940(2) to the contract herein is not an unconstitutional impairment of contract rights. The Fourth United States Circuit Court of Appeals in Garris v. Hanover, 630 F.2d 1001 (1980) and this Court in G-H Insurance Agency, Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336 (1983) misapprehended the holdings of Allied Structual

Steel Company v. Spannaus, et al., 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.3d 727 (1978) and The United States Trust Company v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1978) as applying to this case. The prohibition against impairment of contract rights does not apply unless the contract rights are vested. Due to the regulated nature of the insurance industry, the Appellant had no vested rights in the contract herein which would be violated by the application of §38-37-940(2).

14. The Court overlooked §38-5-70, South Carolina Code of Laws (1976), which requires insurance companies to "perform all duties now or hereafter prescribed by law." Since the Appellant acquired its license to do business subject to §38-5-70, it agreed to be bound by all laws of South Carolina and cannot avoid the application of §38-37-940(2).

15. The Court misapprehended the application of §38-37-940(2) to the contract herein as a retroactive application of the statute. The Court overlooked §38-5-500, South Carolina Code of Laws (1976), which provides for the annual renewal of insurance companies' licenses. By accepting a license to do business in South Carolina on April 1, 1975, the Appellant agreed, pursuant to §38-5-70, to be bound by all laws of South Carolina. Since the Appellant's right to do business in South Carolina was dependent upon acquiring that license, and since the license was acquired following the passage of §38-37-940(2), the application of that section to this contract as a result of its termination in July, 1975 is not a retroactive application of the statute.

16. In concluding that the application of §38-37-940(2) to this contract was an unconstitutional impairment of contracts based

upon the holdings of Allied Structural Steel Company, supra, and United States Trust Company, supra, the Court overlooked the holding in Weaver v. Graham, 101 S.Ct. 960 (1981) which explains that the Contract Clause only protects vested rights.

17. The Court misapprehended that the application of §38-37-940(2) to the contract herein was an unconstitutional impairment of contracts in that the application of this statute constitutes a reasonable exercise of the police power by the state in furtherance of the public welfare. Mazda Motors og America v. S.W. Motors, Inc., 243 S.E.2d 793, 36 N.C. App. (1978).

WHEREFORE, Respondent respectfully prays that the Court reconsider its decision and grant a rehearing of this appeal.

Respectfully submitted.

RATCHFORD AND COOPER

BY:s/
DAVID M. RATCHFORD

BY:s/_____
CHARLES F. COOPER, II
Attorneys for Respondent

1531 Laurel Street

Columbia, South Carolina 29201

(803) 779-0700

Columbia, South Carolina

June 18, 1984

CERTIFICATE OF MERIT

I, Isadore E. Lourie, do hereby certify that I have reviewed the arguments stated in the attached Petition for Rehearing and that the grounds for rehearing are meritorious. I am not now nor have I ever been involved in this action in any way.

s/_____

SWORN TO BEFORE ME THIS

18 day of June, 1984.

s/ James D. Cooper, Jr.
Notary Public of South Carolina
My Commission Expires: 5/31/88

APPENDIX E

Article I, Section 10, of the United States Constitution.

§10. Restrictions upon powers of states.

No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.

APPENDIX F

Fourteenth Amendment to the United States Constitution.

§1. Citizenship rights not to be abridged by states.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§38-5-70. Payment of taxes and performance of duties as condition precedent to doing business.

Every insurance company shall, as a condition for the privilege of entering into and doing business in this State, pay all taxes and perform all duties now or hereafter prescribed by law.

APPENDIX H

§38-5-500. Expiration date of licenses.

All licenses issued by the Commissioner shall be so granted as to expire on the thirty-first of March of each year.

§38-37-310. Insurers required to insure; exceptions.

Insurers of automobile insurance other than insurers designated and approved as specialized insurers by the Commissioner, shall not refuse to write or renew automobile insurance policies or motor vehicle liability insurance policies for individuals as defined in §38-37-10, which are insurable risks as defined herein; nor shall such policies be cancelled except for reasons which had they existed or been known when the policy was written would have rendered the risk not an insurable risk. Every such automobile insurance risk shall constitute an insurable risk unless the operator's permit of the named insured has been revoked or suspended and is at the time of application for insurance so revoked or suspended; provided, however, that no insurer may be required to write or renew automobile

insurance on any such risk if there exists a valid and enforceable outstanding judgment secured by an insurer, an agent, or licensed premium service company on account of automobile insurance premiums which the applicant or insured or any principal operator who is a member of the named insured's household has failed or refused to pay unless such applicant or insured shall pay in advance the entire premium for the full term of the policy sought to be issued or renewed or the annual premium, whichever is the lesser; nor shall any such insurer be precluded from effecting cancellation of any such automobile insurance policy, either upon its own initiative or at the instance of an agent or licensed premium service company, because of the failure of any such named insured or principal operator to pay when due any such automobile insurance premium or any installment payment thereof;

except that every such notice of cancellation for nonpayment of such premium or installment shall notify the person to whom the notice is addressed that such notice shall be void and ineffective if payment of the full amount of the premium or premium indebtedness, whichever is the greater, is made to the insurer, agent, or licensed premium service company named in the notice on or before the otherwise effective date of cancellation, and no such notice of cancellation shall be deemed or held to be ineffective as being conditional, ambiguous, or indefinite.

§38-37-920. Insurers and agents shall not refuse acceptance of insurance; property rights of certain agents; restriction of mailings to certain areas.

No insurer of automobile insurance which customarily accepts risks directly from applicants for automobile insurance through salaried employees or exclusive agents shall refuse acceptance of automobile insurance for an insurable risk from any such applicant nor require that certain classes or types of such risks, be placed through some particular agent or employee; nor shall any insurer of automobile insurance which customarily accepts automobile insurance through independent agents refuse acceptance of automobile insurance for an insurable risk from any such agent nor require that certain classes or types of such risks be placed only through particular agents; provided, however, that nothing herein is

intended to preclude any such insurer from recognizing and giving effect to the property rights of such agents in expirations or renewals.

(l) No agent who represents more than one insurer of automobile insurance shall refuse to accept in behalf of an insurer represented by him automobile insurance for an insurable risk where the applicant for such insurance designates by name or description the insurer of his choice, but if such applicant relies upon the skill and judgment of the agent to place the risk in any insurer represented by the agent, the agent may place such risk in the insurer which he deems appropriate; provided, however, that no insurer shall agree, collude, or conspire with any such agent nor give, offer, or promise any such agent anything of value to place any risk or any class or type of risk under such circumstances in

any other insurer; every such agreement shall be utterly void, and every such act of collusion or conspiracy shall constitute an act of unfair competition by both such insurer and agent which, if proved, shall result in the suspension or revocation of the license of each for not less than one year, in addition to any other penalties or liabilities applicable.

(2) No automobile insurance insurer licensed to transact automobile insurance in this State which now offers or shall hereafter offer such insurance through the mails or use the mails in transacting such insurance on insurable risks situate in this State shall restrict its mailings or offerings to certain counties, areas, or zip-code territories of this State. The Commissioner is authorized and directed to examine any such insurer's records at such times and so often as the Commissioner

deems necessary to determine that such an insurer is not so restricting or limiting its offerings.

APPENDIX K

§38-37-940. Avoiding certain classes or types of risk; exceptions; canceling agent's representation.

* * *

(2) No insurer of automobile insurance shall cancel its representation by an agent primarily because of the volume of automobile insurance placed with it by the agent on account of the statutory mandate of coverage nor because of the amount of the agent's automobile insurance business which the insurer has deemed it necessary to reinsure in the Facility.

Office-Supreme Court, U.S.
FILED
DEC 29 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-588

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

Insurance Financial Services, Inc.

Petitioner,

vs.

South Carolina Insurance Company,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

SINKLER GIBBS & SIMONS
John P. Linton
Karen LeCraft Henderson*
Post Office Box 11458
Columbia, SC 29211
(803)765-1885

Lanville H. Mengedoht
Bernard Manning
Post Office Box 1
Columbia, SC 29202

ATTORNEYS FOR RESPONDENT

*Counsel of Record

22

QUESTIONS PRESENTED

1. DID THE SOUTH CAROLINA SUPREME COURT VIOLATE THE PETITIONER'S DUE PROCESS OR EQUAL PROTECTION RIGHTS BY OVERRULING A PRIOR DECISION?

2. DID THE SOUTH CAROLINA SUPREME COURT ERR IN HOLDING THAT THE APPLICATION OF SOUTH CAROLINA CODE SECTION 38-37-940(2) TO A CONTRACT ENTERED INTO PRIOR TO THE EFFECTIVE DATE OF THE STATUTE VIOLATED THE CONTRACT CLAUSE OF THE UNITED STATES AND SOUTH CAROLINA CONSTITUTION?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
DESIGNATION OF CORPORATE RELATIONSHIPS.....	vi
OPINION BELOW.....	1
JURISDICTIONAL GROUNDS.....	2
STATEMENT.....	3
SUMMARY OF ARGUMENT.....	10
ARGUMENT:	
I. Did the South Carolina Supreme Court violate the Petitioner's due process or equal protection rights by overruling a prior decision?.....	11
II. Did the South Carolina Supreme Court err in holding that the application of South Carolina Code Section 37-37-940(2) to a contract entered into prior to the effective date of the statute violated the contract clause of the United States and South Carolina Constitution?..	16
CONCLUSION.....	20

APPENDICES:

Appendix A. First Two Exceptions Raised On Appeal..... A-1

Appendix B. Question IV, Respondent's Brief, South Carolina Supreme Court..... B-1

TABLE OF AUTHORITIES

CASES:	Page
Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978).....	17
Arizona v. California, ___ U.S. ___, 103 S.Ct. 1382, 1391 n.8 (1983).....	13
Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933).....	2
Bobo Brothers, Inc. v. South Carolina Tax Commission, 271 S.C. 18, 244 S.E.2d 519 (1978).....	15
Energy Reserves Group, Inc. v. Kansas Power and Light Co., ___ U.S. Kan. ___, 103 S.Ct. 697 (1983).....	17
Exxon Corp. v. Eagerton, ___ U.S. Ala. ___, 103 S.Ct. 2296 (1983).....	17
G-H Insurance Agency Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336 (1982).....	passim
Garris v. Hanover Ins. Co., 630 F.2d 1001 (4th Cir. 1980)....	passim
Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166	

S.E.2d 297 (1969)..... 14

Illinois v. Gates, ___ U.S. Ill. ___, 103 S.Ct. 2317 (1983)... 2

Lear, Incorporated v. Adkins, 395 U.S. 653, 89 S.Ct. 1902 (1969)..... 2

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965).... 16

Messinger v. Anderson, 225 U.S. 436, 32 S.Ct. 739 (1912)..... 13

David E. Rowell d/b/a Rowell Insurance Agency v. Harleysville Mutual Insurance Company, 272 S.C. 108, 250 S.E.2d 111 (1978)... passim

United States Trust Co. of New New York v. New Jersey, 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505 (1977)..... 17

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 61 S.Ct. 347 (1941)..... 16

STATUTORY PROVISIONS:

South Carolina Statutes At Large

S.C. Code §38-37-10 et seq... 3

S.C. Code §38-37-940(2)..... 10,17,18

United States Code

28 U.S.C. 1257(3)..... 2

DESIGNATION OF CORPORATE RELATIONSHIPS

South Carolina Insurance Company, as Respondent in this proceeding, states that:

This is its original Designation of Corporate Relationships.

South Carolina Insurance Company is a wholly owned subsidiary of The Seibels Bruce Group, Inc.

South Carolina Insurance Company does not have an ownership interest in any subsidiaries, excepting wholly owned subsidiaries.

South Carolina Insurance Company has affiliate relationships with the following companies: Investors National Life Ins. Co., Argus Life Ins. Co., Kentucky Ins. Co., Consolidated American Ins. Co., Catawba Ins. Co., South Carolina Title Ins. Co., Premium Service Corp., Rathbone, King & Seeley, Inc., American Agency Service Inc., Forest Lake Travel Services, Inc., Gay & Taylor, Inc.,

Policy Management Systems Corp., Derek Ware Ins. Brokers Inc., Industrial Claims Service of Calif., American Star Ins. Co., Mutual Data Inc., Seibels Bruce Policy Management Systems Ltd (Canada) and Business Computer Systems Corp.

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported at ___ S.C. ___, 318 S.E.2d 10 (1984).

JURISDICTIONAL GROUNDS

The Petitioner has attempted to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3). Each of the first four questions presented in the petition was first raised in the appeal to the South Carolina Supreme Court on Petition for Rehearing, see Petition For Writ, pp. 6-7, and as such was untimely under South Carolina procedure, Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933), and this Court lacks jurisdiction to consider those issues. Lear, Incorporated v. Adkins, 395 U.S. 653, 89 S.Ct. 1902 (1969). See also Illinois v. Gates, ___U.S. Ill. ___, 103 S.Ct. 2317 (1983)(question of whether issue is jurisdictional or prudential discussed, but not resolved).

STATEMENT

In 1974, the General Assembly of South Carolina enacted South Carolina Code §38-37-10 et seq relating to the sale of automobile insurance. The statute became effective on July 9, 1974. One of the provisions of the statute made it illegal for a company to cancel its contract with its agent due to the volume of automobile business written by the agent. Prior to the enactment of the statute, the Petitioner had entered into an agency contract with the Respondent which included a provision for termination at the will of either party upon written notice. Before the enactment of the statute, insurance companies were not regulated in their relationship with their agents as the Petitioner acknowledges. Petition For Cert., pp. 9-10.

Following the enactment of South Carolina Code §38-37-10 et seq, the Respondent attempted to terminate its agency

relationship in accordance with the terms of the contract. After protracted litigation, the state trial court awarded summary judgment in favor of the Respondent on the basis that the only cause of action alleged by the Petitioner was for a violation of the statute prohibiting agency termination, and that application of the agency termination provision of the statute to a contract predating it would impermissibly impair the rights of the Respondent under the Constitutions of South Carolina and of the United States. The Petitioner appealed to the South Carolina Supreme Court.

While the Petitioner's appeal was pending, the South Carolina Supreme Court decided David E. Rowell d/b/a Rowell Insurance Agency v. Harleysville Mutual Insurance Company, 272 S.C. 108, 250 S.E.2d 111 (1978), a three to two decision, holding the statute could prohibit agency termination involving a contract predating its enactment. The majority opinion did not discuss any of the

decisions of this Court concerning the federal constitutional issue.

The Petitioner and Respondent stipulated that the determination of the constitutional issue in the Rowell case was controlling, therefore, the appeal was disposed of summarily and remanded for further consideration "...in the manner appropriate consistent with the outcome of David E. Rowell d/b/a Rowell Insurance Agency v. Harleysville Mutual Insurance Company." Petition For Cert., App. B-1.

Numerous procedural developments in the action delayed the trial of the case until April 1981.

In September 1980, the United States Court of Appeals for the Fourth Circuit decided Garris v. Hanover Ins. Co., 630 F.2d 1001 (4th Cir. 1980), and, applying the decisions of this Court, concluded that the statute could not prohibit a carrier from terminating an agent concerning a contract entered into before the enactment of the

statute. The Fourth Circuit considered the right of termination of an agency to be a substantial, bargained for right that was "...a critical feature of its total contractual relationship with its agents...," p. 1006, and that "...the predominant purpose of the challenged provision was to protect the private interest of the affected insurance agents rather than any broader societal interest." p. 1009.

At the time of the April 1981 trial, the status of the constitutional issue was that the parties presently before the Court had stipulated their action was to be controlled in a manner consistent with the Rowell opinion and, based upon the controlling effect of Rowell, the action proceeded to a jury verdict in favor of Petitioner. A different result would have obtained if a similar action had proceeded in the United States District Court, per force the controlling precedent of Garris in the Fourth Circuit.

Following the trial of the case, as the first two exceptions raised on appeal (writs of error in the state system), the Respondent sought review of the state and federal constitutional issue primarily on the basis that the South Carolina Supreme Court should reconsider the Rowell opinion and apply the analysis utilized by the Fourth Circuit in Garris. Appendix A.

While the appeal was pending, the South Carolina Supreme Court decided G-H Insurance Agency Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336 (1982). In G-H, the Court reviewed the issue decided in Rowell. The court noted it was not bound by the Fourth Circuit's Garris opinion, but that it agreed with its holding and reasoning and therefore reversed the Rowell decision on the basis that both the South Carolina and United States Constitutions prohibited application of the statute to a contract which predated the statute.

Further, in G-H the South Carolina Supreme Court observed that its experience with this particular statute and common knowledge in the state concerning it convinced the Court that the challenged provision was not necessary for the accomplishment of the broad public purpose of regulating automobile insurance sales. Moreover, it concluded that the restriction on agency termination primarily conferred a private right upon the agents and involved the relationship between carrier and agent, an area previously unregulated by the State.

Thereafter, the South Carolina Supreme Court applied its G-H holding to the action at bar, resulting in a judgment n.o.v. The issue of application of Garris and G-H was raised by the Respondent's first two exceptions in the South Carolina Supreme Court, addressed fully in its Question IV on appeal, in a motion prior to oral argument to criticize the Rowell opinion and briefed in its primary and reply brief. Petitioner's

sole argument was that as a matter of state procedure based on the law of the case doctrine, res judicata, and collateral estoppel, the South Carolina Supreme Court should not apply Garris or G-H. Appendix A. As conceded by the Petitioner, its first challenge on due process and equal protection grounds came in its Petition for Rehearing. Petition For Cert., pp. 6-7.

SUMMARY OF ARGUMENT

The Petitioner's due process and equal protection arguments are not properly before the Court because they were not raised until a Petition For Rehearing in the South Carolina Supreme Court. The Petitioner's arguments are invalid because a court's refusal to apply the law of the case doctrine does not violate due process or equal protection rights, particularly when the parties have stipulated the rule of law announced in another case would control the outcome of the pending case.

South Carolina Code §38-37-940(2) cannot be applied to prohibit termination of an agency contract entered into before the statute was enacted because the statute substantially impairs the contract of the parties and the statute was enacted primarily to confer a private benefit upon a private party rather than addressing a broad societal problem.

ARGUMENT

QUESTION I

DID THE SOUTH CAROLINA SUPREME COURT VIOLATE THE PETITIONER'S DUE PROCESS OR EQUAL PROTECTION RIGHTS BY OVERRULING A PRIOR DECISION?

Petitioner urges its due process and equal protection rights were violated because the South Carolina Supreme Court applied the G-H and Garris decisions rather than the Rowell decision, which the South Carolina Supreme Court had overruled. In essence, the Petitioner claims that the so called law of the case doctrine vested the Petitioner with the substantive right to avoid application of the correct ruling on the constitutional issue.

Petitioner's argument fails for at least three reasons. First, no due process

and equal protection arguments were advanced to the South Carolina Supreme Court until the Petition for Rehearing. Petition For Cert., pp. 6-7. The Petitioner attempts to circumvent the settled rule that matters not properly presented below are not available as a grounds for certiorari on the basis that it could not raise the due process and equal protection argument until the South Carolina Supreme Court's decision had been entered. The Respondent had raised the constitutional issue in its exceptions, and had fully briefed the matter in its Question IV on appeal which read as follows:

> South Carolina was entitled to judgment n.o.v. because application of a cause of action based on violation of South Carolina Code, Section 38-37-940, to a contract entered into prior to the adoption of that statute violates the impairments of contracts clauses of the South Carolina and United States Constitutions?

Appendix A. Petitioner did not contend that acceptance of Respondent's position would violate Petitioner's constitutional rights. Rather, its sole resistance was that as a

matter of state procedure, Respondent should not be allowed to reargue the constitutional issue. Petition For Writ, pp. 6-7. Accordingly, based on the authorities cited in the jurisdictional grounds, supra, the issues of due process and equal protection are not preserved for certiorari.

The second reason the Petitioner's argument fails is as noted by Justice Holmes in Messinger v. Anderson, 225 U.S. 436, 32 S.Ct. 739 (1912):

> In the absence of statute the phrase, "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. p. 740.

See also Arizona v. California, ___ U.S. ___, 103 S.Ct. 1382, 1391 n.8 (1983), where the Court stated, "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest

injustice." It follows that Petitioner cannot claim that it has a constitutionally protected right to circumscribe the power of the South Carolina Supreme Court to apply the correct rule of law to this case.

The one case cited by Petitioner, Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969), is easily distinguished. It involved the South Carolina Supreme Court's refusal to review the sufficiency of the evidence to submit an abuse of process action to the jury. In an earlier appeal the South Carolina Supreme Court had concluded the evidence was sufficient to present jury issues and there being no substantial difference between the evidence on the former trial, applied the law of the case doctrine.

Third, the Petitioner stipulated that the Court's determination of the issue in Rowell was controlling and the South Carolina Supreme Court remanded the action for consideration in a manner consistent with

the outcome of Rowell. Since Rowell has been overruled, it is difficult to appreciate the argument that either due process or equal protection has been denied merely because the Petitioner litigated the action in anticipation that the Rowell decision would allow the Petitioner to proceed.

The Petitioner cites Bobo Brothers, Inc. v. South Carolina Tax Commission, 271 S.C. 18, 244 S.E.2d 519 (1978), for the proposition that a constitutional issue cannot be raised for the first time on appeal, but the issue of constitutionality had been raised below. Following remand upon the stipulation of the parties that the rule of law announced in Rowell was controlling, there was obviously no requirement to replead the constitutional issue and have the state trial court pass upon it since the lower court was bound to apply the South Carolina Supreme Court opinion in Rowell. Further, the decision of the South Carolina Supreme Court under review applies those principles

enunciated by this Court in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965), and Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 61 S.Ct. 347 (1941).

For the foregoing reasons, it is respectfully submitted that the Court should not grant the Petition for Certiorari based on due process or equal protection arguments advanced by the Petitioner.

QUESTION II

DID THE SOUTH CAROLINA SUPREME COURT ERR IN HOLDING THAT THE APPLICATION OF SOUTH CAROLINA CODE SECTION 38-37-940(2) TO A CONTRACT ENTERED INTO PRIOR TO THE EFFECTIVE DATE OF THE STATUTE VIOLATED THE CONTRACT CLAUSE OF THE UNITED STATES AND SOUTH CAROLINA CONSTITUTION?

In the instant case, the South Carolina Supreme Court and United States Court of Appeals for the Fourth Circuit have

considered whether South Carolina Code §38-37-940(2) could eliminate the Respondent's contractual right to terminate its agency relationship involving a contract which was entered into before enactment of the statute. The result reached by both the federal and state Courts is the same. Based on the decisions of this Court including Energy Reserves Group, Inc. v. Kansas Power and Light Co., ___ U.S. Kan. ___, 103 S.Ct. 697 (1983), Exxon Corp. v. Eagerton, ___ U.S. Ala. ___, 103 S.Ct. 2296 (1983), Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978), and United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505 (1977), a two step analysis must be applied. The threshold inquiry is whether a state law has substantially impaired a contractual relationship. Second, does the adjustment of the contractual rights of the parties rest upon reasonable conditions supporting a public purpose which justified

the statutory enactment? A detailed analysis of the statute under scrutiny was conducted both by the Fourth Circuit in Garris and the South Carolina Supreme Court in the G-H decision. In Garris, the Fourth Circuit concluded the provision of South Carolina Code §38-37-940(2) was to further purely private interests of the agents, rather than any broad societal purpose. p. 1010. The South Carolina Supreme Court observed that prior to the statute at issue there was no law relative to cancellation of agency agreements and that an important aspect of an agency relationship is the unrestricted right to cancel. "There is no right incident to contracting more important than that of selecting the person with whom a binding agreement will be made." G-H, supra, 294 S.E.2d 338. Additionally, the South Carolina Supreme Court concluded:

> It should have been patent at the time of The Act, and experience now reveals beyond question, that the provision in contest here was not necessary to the accomplishment of

the overall purpose of The Act. 294 S.E.2d 340.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition For Certiorari be denied.

Respectfully submitted,

SINKLER GIBBS & SIMONS
John P. Linton
Karen LeCraft Henderson*
Post Office Box 11458
Columbia, SC 29211
(803)765-1885

Lanville H. Mengedoht
Bernard Manning
Post Office Box 1
Columbia, SC 29202

Attorneys for Respondent

*Counsel of Record

APPENDIX A

FIRST TWO EXCEPTIONS RAISED ON APPEAL IN THE SOUTH CAROLINA SUPREME COURT

1. The trial judge committed error in refusing to direct a verdict in favor of Appellant and refusing Appellant's motion for judgment notwithstanding the verdict. Appellant was entitled to such relief because the application of Section 38-37-940 of the 1976 South Carolina Code to the Appellant's contract violates the impairments of contract clause of the South Carolina Constitution, Article I, Section 4.

2. The trial judge committed error in refusing to direct a verdict in favor of Appellant and refusing Appellant's motion for judgment notwithstanding the verdict. Appellant was entitled to such relief because the application of Section 38-37-940 of the 1976 South Carolina [sic] to the Appellant's contract violates the

impairments of contract clause of the Constitution of the United States of America, Article I, Section 10.

APPENDIX B

QUESTION IV, RESPONDENT'S BRIEF, SOUTH CAROLINA SUPREME COURT

South Carolina was entitled to judgment n.o.v. because application of a cause of action based on violation of South Carolina Code, Section 38-37-940, to a contract entered into prior to the adoption of that statute violates the impairments of contracts clauses of the South Carolina and United States Constitutions.

CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for respondent and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage prepaid, and addressed as follows:

David M. Ratchford
1531 Laurel Street
Columbia, South Carolina 29201

This 28th day of December, 1984.

Karen LeCraft Henderson

KAREN LeCRAFT HENDERSON

Post Office Box 11458
Columbia, S.C. 29211